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Supreme Court of the United States

October Term, 1958

No. 358

DEFENCE CONSTRUCTION COMPANY, INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

Petitioners,

—v.—

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Petition	1
Opinions of the Court Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	4
Reason for the Granting of the Writ	8
Conclusion	11
Appendix A—Opinion	1a
Appendix B—Opinion (Ginsberg v. U. S.)	9a
Appendix C—Judgment	26a

AUTHORITIES CITED

Cases

Boyd v. U. S., 142 U. S. 450	10
Ginsberg v. U. S.	4, 9
Louisiana & A. Ry. Co. v. Moore, 229 F. 2d 1, cert. den. 351 U. S. 952	9
Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F. 2d 13	9
Troup v. Chicago, etc., 234 F. 2d 253	9
U. S. v. Maryland Casualty Co., 146 F. 2d 379, C.A. 5, 1944	10

Statute

Title 28 U. S. Code, Section 1254(1)	2

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—v.—

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Respondent.

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To The Honorable Chief Justices and The Associate Justices of The Supreme Court of The United States

Your petitioners, DE FONCE CONSTRUCTION COMPANY, INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY respectfully show:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 18, 1958.

Opinions of the Court Below

The opinion of the Court of Appeals for the Fifth Circuit is marked Appendix A, hereto annexed.

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 18, 1958. A copy of the judgment is annexed hereto and marked Appendix "C".

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1).

Questions Presented

In its opinion, the Court of Appeals gave varying reasons for the affirmance of the judgment of the lower court, and these conclusions we contend are erroneous, and the reasons therefor are the very same reasons underlying the petition for the issuance of the writ, and they are, as follows:

1. Whether the Court of Appeals in its opinion erroneously held that the petitioners' specifications of error, numbers, 5, 7, 8 and 11, could not be considered, since no motion for a directed verdict was made.

2. Whether the Court of Appeals erroneously held that the petitioners could not bring up for review any specifications of error, since no timely objections were taken to rulings of the court.

3. Whether the Court of Appeals was in error in barring review of the refusal to charge the requests of the petitioners and in the errors committed by the court in its charge to the jury, because no objections were taken albeit the petitioners had contended that these objections were unnecessary to be repeated in the face of the court's stated and avowed position respecting these matters in the affirmative part of the trial of the case itself, and to have renewed the objections to the court at this point would have been nothing but a futile gesture.

4. Whether the Court of Appeals erred in its position respecting petitioners' specifications of errors, numbers, 5, 7, 8, and 11, in stating that no timely objection was taken, and the petitioners did move for a new trial and asked to have the verdicts set aside.

5. Whether the Court of Appeals erred in refusing to acknowledge the petitioners' contention that the verdict of the jury was inconsistent and logically irreconcilable in view of the cold logic of the facts adduced in the evidence as well as upon the arithmetical equations which the evidence disclosed could not make possible the type of verdict that was rendered by the jury. The Court of Appeals completely overlooked the petitioners' specification of error concerning the adduction of proof of the respondent's damages both for rental claimed, for conversion, and materials claimed to have been lost or damaged since the appropriate criteria for the establishment of these damages were not followed in the presentation of the respondent's proof concerning these items of damage.

6. Whether the Court of Appeals failed to notice the plain error which was committed by the trial court and

which made it obvious that these plain errors were prejudicial to the rights of the petitioners and the petitioners could not very well continue to reassert these objections in the face of the plain position taken by the trial court concerning the consent of both the petitioners' theory of the case as well as that of the respondent, and again repetition of the petitioners' position would have been futile and would have merely tended to arouse the ire of the court and would achieve nothing at all.

7. Whether the reason given by the court of appeals for its refusal to recognize plain error, is inconsistent with a later decision made by the Court of Appeals in the case of *Sydney Ginsburg against U. S.*, decided by the Court on June 30, 1958 and not yet officially reported, and a copy of which opinion is annexed hereto and marked Appendix B.

Statement of the Case

This action was brought in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, by the petitioners against the respondent, to recover damages on varying counts, including breach of contract and negligence, and the action was thereafter removed to the United States District Court for the Southern District of Florida, Miami Division, for reasons of diversity of citizenship. The respondent counterclaimed for damages covering amounts due for rental of equipment, conversion of materials by the petitioners and allegedly being the property of the respondent, and for failing either to return the materials of the respondent or returning the same in a defective condition.

The petitioners contended that the respondent failed to furnish, as per its contract with the petitioners (Plaintiff's Exhibit 7 (Volume 2, R. 1021-1037)), adequate and sufficient wellpoint equipment and pumps in the required places, in order to dewater a coffer dam at 9th Street off Biscayne Bay, in the City of Miami, Florida, and thereby enable the petitioners to install the foundation and understructure for a pumping station which was a link in a chain of pumping stations to be erected by the petitioners under a contract which they in turn had with the City of Miami for the building of a sewage disposal system. After a lengthy trial before the Court (Honorable Emmett Choate) and a Jury, a verdict was returned in favor of the petitioners in the amount of $33,293.17, and by the same Jury, in favor of the respondent and counterclaimant in the amount of $94,957.45. A motion for a new trial was denied by the Court (R. 117-179).

The verdict in favor of the petitioners was predicated not only upon the contract, Plaintiff's Exhibit 7, *supra*, but upon evidence which disclosed subsequent modifications, extensions and waivers of the said contract, which were confirmed both orally and by writing as well as the acts of the parties. These evidentiary matters were no doubt relied upon by the Jury in returning a verdict in favor of the petitioners on their affirmative case.

The petitioners' damages consisted of the expenditure of various sums of money for labor, equipment, trucking, grouting of the coffer dam, and duplicating by additional expenditures of money the work and material which in the first instance could have been achieved but for (a) the failure of the respondent to furnish the correct equipment and place the same properly in the dewatering area in

order to enable the dewatering of the site, and (b) the negligent interferences with the job project by suggesting and compelling an open pump down of the coffer dam early in April 1955, as a result of which the entire bottom was disrupted and all of the effort expanded went to naught, and (c) the respondent's repeated failure on and after March 1955 and up to and including the end of July, 1955 to send additional equipment, adequate in size and capacity to achieve the dewatering, and which although they ostensibly undertook to furnish, they did so only half-heartedly, and as a result of which the existent damages were further aggravated.

After July 30, 1955, when it became obvious that the respondent was dawdling with its contract requirements, and that its oft repeated promises were not performed, and the dewatering required under the contract aforementioned could not be achieved, the petitioners were obliged to use an intrusion prepakt system at great cost and damage to themselves, and thereby permitted to remain on the site of the job of the respondents' equipment and facilities minus some minor items which either could not be detached from the ground or were not worth the effort in returning and of no signal value, but which were redelivered to the respondent at great cost to the petitioners.

Both in the pleadings and by the proof, the petitioners contended that on and after July 1955 it had been unjustifiably deprived of equipment claimed to be owned by it, and that the petitioners had converted the same to their own use, and damages were requested therefor. In addition, the respondent demanded the payment of the established contract rental rate of $250. per day as required

under plaintiff's exhibit 7, for the entire period of time that the equipment and facilities were on the project site, minus a period of sixty days, which was the initial sixty day exploratory period provided for under the contract to ascertain whether or not the equipment could functionally do the job intended, namely to dewater the site.

Towards the close of the entire case, the Trial Court although having permitted the petitioners throughout the lengthy two week trial to offer evidence as to all of the damages sustained, up to and including the end of July, 1955, when the use of the well points was abandoned, decided to limit the petitioner's proof to the sixty day period ending November 10, 1954; asserting that the petitioners were bound to return the equipment after that time under the provisions of Exhibit 7, and if they did not, they were merely gambling on their own and waived any damages thereafter sustained. The Court did this despite the strenuous objections of petitioners' counsel that there was no reason for the Court's reversal of its position and theory of the case, and that the evidence indicated an agreement for the grouting according to petitioners' witnesses, which was to commence November 10, 1954 and continue throughout the job as long as necessary, and which turned out to be until July 1955, and further that the respondent in April of 1955, supervised the pump down of the coffer dam over the objections of the petitioners, thereby disrupting the bottom and surely committing an act of negligence, and by thereafter entering into a further arrangement, as evidenced by the testimony of J. B. Cooper, and by Exhibit 14, the letter of April 19, 1955 (R. 1039) under which they agreed to and actually did send additional equipment, machinery and facilities for the said job, and consequently,

although there might have been initially one agreement, that there had been subsequent new additions to the agreement or waivers, modifications and/or extensions of the same, sufficient to enable the petitioners to claim the damages resulting from all of the foregoing. The trial court overruled these contentions and limited the petitioners' proof to the sixty day period.

Of course, this tended to confuse the Jury as hereinabove indicated, and this was disclosed by the fact that the Jury returned on two separate occasions, and the colloquy between the Court and the Jury is contained in rather voluminous portions of the record which have been hereinabove referred to, and which seem to indicate quite overwhelmingly that the Jury had one theory of the case, which had been imparted to it in the posture in which the case was presented, and the, towards the end of the case the entire concept was radically revised, so that the jury was in doubt as to what damages it could or could not award to the appellants.

Reason for the Granting of the Writ

The United States Court of Appeals for the Fifth Circuit, in applying the rule of damages and the failure to recognize the existence of plain evidence, acted in conflict with its own decision and with other Circuits and State Courts which have passed upon the question.

The petitioners contend that:

(a) There is no need to reassert objections to the charge of the Court upon the failure of the Court to give the petitioners' request for instructions since the petitioners' position had already been made known to the Court during the

trial, and since the Court had overruled the petitioners' objections, there was no need for reassertion thereof; and

(b) Irrespective of that, since the error committed by the Court was very plain, it was therefore cognizable for the Court of Appeals. *Shokuwan Shimabukuro* v. *Hideyoshi Nagayama*, 140 F. 2d 13; *Louisiana & A. Ry. Co.* v. *Moore*, 229 F. 2d 1, cert. den. 351 U. S. 952.

In the last mentioned case, it was held that an Appellate court may notice plain errors even though they were not properly objected or excepted to in the trial court. See also the concurring opinion of Judge Frank in *Troup* v. *Chicago, etc.*, 234 F. 2d 253, 261.

The Court of Appeals in this case in its opinion asserts its unwillingness to accept the foregoing doctrine. Yet it is interesting to note the change of position of the Court of Appeals for the Fifth Circuit in a decision in a criminal case which followed within a matter of almost a month after the rendition of the opinion in the instant case, and we refer to the case of *Sydney Ginsberg* v. *U. S.*, and which opinion appears at Appendix B hereof.

It will be noted from the majority and dissenting opinions in that case that the Court went out of its way to note plain error in the absence of any objection (albeit in our case, there were objections taken during the trial). By noting plain error, the Court was able to reverse judgment of conviction of the lower court in that case. We fail to perceive any logical distinction between the instant case and the case last cited, and why there should have been a difference in the perspective in the Court's view of the two cases. If we are to follow through logically with the Court's acceptance of the doctrine enumerated in the last mentioned case, namely, *Sydney Ginsberg* v. *U. S.*, we

would be led to the irresistible conclusion that by noting the plain error in the instant case, it would have been, of necessity, the requirement of a reversal of the judgment.

In its opinion in the instant case, the Court of Appeals held that the petitioners' specification of errors Nos. 5, 7, 8 and 11 could not be considered reviewable since no motion for a directed verdict had been made by the petitioners, and because no timely objections were taken to the Court's ruling. Despite this ruling by the Court of Appeals in the instant case, this Court has stated in *Boyd* v. *U. S.*, 142 U. S. 450, that where erroneous evidence is admitted and the Court fails to cure this error by an adequate and sufficient charge to the jury, a failure to object to such a charge, is not a waiver of the original exception to the admission of the evidence originally objected to.

This Court, in *Boyd* v. *U. S.*, recognized the futility and meaninglessness of objecting and excepting to a portion of the charge to the jury which erroneously followed the pattern of the original error of the Court committed during the trial in receiving or refusing to receive evidence under an erroneous assumption, and to which exception had already been taken.

The Circuit Court of Appeals in the instant case refused to take cognizance of this Court's ruling as to measure of damages regarding the unlawful detention of rental equipment in which this Court stated that such an unlawful detention does not give rise to an action to recover rental value. This may be found in the case of *U. S.* v. *Maryland Casualty Co.*, 146 F. 2d 379, C. A. 5, 1944. At page 381, the Court states as follows:

> " * * * The damages for the mere unauthorized detention of rented equipment after termination of

> the use thereof is not ordinarily wholly measurable by the provisions in an independent covenant for the stipulated monthly rental of the equipment in the absence of any substantial use of such equipment during the period of unauthorized detention, for the reason that such rental value generally contemplates and includes a substantial allowance for the depreciation or wear and tear to which the equipment would not be subjected after the cessation of the use of such equipment. Cook v. Packard Motor Car Company, 88 Conn. 590, 92 A. 413, L.R.A., 1915 C, 319, Text 324."

The Court of Appeals erred in failing to accept the petitioners' contention that the verdict of the jury and the judgment rendered thereon were inconsistent and irreconcilible. The Court of Appeals completely omitted any mention of this contention, and quite obviously, ignored it entirely since a proper appraisal of this error would have indicated that the verdict of the jury was arithmetically not supportable, and as such, it should have been vacated.

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16706

DE FONCE CONSTRUCTION COMPANY, INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

Appellants,

versus

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY, INC,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 18, 1958.)

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

Hutcheson, Chief Judge: This suit grows out of a contract made by appellants, plaintiffs below, with Complete Machinery and Equipment Company to provide the machinery, equipment and supervision necessary to do the dewatering in connection with a contract made with the

water and Sewage Trust Board of the City of Miami to construct housing for six pumping stations. It was for damages resulting to plaintiffs from claimed breaches of contract by, and negligence of, defendant and for an injunction against removal of defendant's equipment from the job site.

Defendant denied the charges against it and, by an amended counter claim brought under the Florida statutes in the name of the City of Miami for the use of counter claimant, sued for large sums for rental and for injury to, and conversion of, its equipment. Plaintiffs in turn denied these claims and, on the issues made by the pleadings, the case was fully tried to a jury and a large record of more than a thousand pages was made.

The trial concluded, the district judge, on a general charge, to which no objection was made or exception taken, submitted to the jury for separate verdicts, the claims and counter claims, and, on these verdicts separately returned, $33,293.17 for the plaintiffs and $94,957.45 for the counter claimant, separate judgments were on Dec. 27, 1956, entered in said sums. The motions of plaintiffs and counter claim defendants for new trial denied, the counter claim defendants, on Feb. 6, 1957, gave notice of appeal "from the final judgment entered on Dec. 27, 1956, in the sum of $94,957.45 adverse to these appellants" and here, with eleven numbered specifications of error argued in their brief under three points:

> Point 1. The court erred in limiting the plaintiffs' proof to a sixty day period and limiting the jury's deliberation by its instruction to said period.

Point 2. The court erred with respect to the proof concerning the appellee's counter claim to its damages.

Point 3. The appellants' request for instructions should have been allowed by the court.

they seek a reversal not only of the judgment appealed from but also of the judgment from which they did not appeal.

Appellee, pointing out that specifications Nos. 1, 2, and 3, discussed under point one of appellants' brief, that the court erred in limiting the plaintiffs' recovery to a sixty day period, present claims of error with respect to the judgment in appellants' favor, from which no appeal was taken, and, citing *Tjoseveig* v. *Donohoe*, 262 Fed. 911, *United States* v. *Hosteen Tse Kesi*, 191 F. (2) 518, and *Bryant* v. *Mass. Bonding & Insurance Co.*, 158 F. (2) 967, urges upon us that these claims of error are not before us for decision. In addition it insists that, if mistaken in this, appellants are in no better position to complain of the sixty day limitation for it is the direct result of instructions given the jury, to which appellants made no objection and to the giving of which they did not complain until after the verdict.

Of appellants' specifications of error Nos. 5, 7, 8 and 11, dealt with in their point two, appellee insists that these specifications come in the end merely to the contention that the evidence was insufficient to sustain the verdict and that, since no motion for a directed verdict was made, no question of the sufficiency of the evidence is before us. It insists further that appellants would not stand any

better if their complaint on this score is taken as attacking not the failure to instruct a verdict but the nature of the proof employed by appellee in establishing its damages and the claimed incompetence of the testimony offered by it in support of its claim, for no reference is given in appellants' brief to, and a search of the record fails to disclose, the place or places in the record where such objections were made and overruled.

Urging upon us that appellants' specifications Nos. 4, 6, 9 and 10, discussed under its point three "The appellants' request for instructions should have been allowed by the court", present nothing for our consideration since no objections or exceptions were taken at any time to any of the instructions given by the court to the jury, appellee insists that what appellants in effect are asking of this court is that, notwithstanding their complete failure to comply with Rule 51, Federal Rules of Civil Procedure, 28 U. S. C. A. and the cases construing and applying it, it permit them now to urge and claim as error matters to which they failed to object below.

Finally, appellee, meeting head on the contentions appellants make, urges upon us that the facts of record fully support the actions of the court and jury throughout, and that a careful examination of the record will show that the evidence offered to sustain the damages awarded appellee is not only consistent with the tendered issues but in all respects conforms thereto. In short, it is appellee's position that while in the state of the record appellants have no right to impose upon this court the

burden of searching the record for the errors appellants claim, such a search if made will disclose that there was ample evidence to support the verdict of the jury, and will establish that all that appellants are seeking to do here is to have this court retry issues of fact properly submitted to and as properly determined against them by the jury.

For reasons which we will state as briefly as possible, we find ourselves in substantial agreement with appellee's views that, in a brief and on a record which fails to point to specific objections sufficiently drawing the attention of the trial court to particular errors claimed and affording it opportunity to correct them, appellants seek to bring about here a general combing and review by us of the whole record to find, and reverse for, claimed errors not plain on the face of the record but lurking therein, not properly pointed out below or assigned here.

This is particularly true of appellants' specification No. 11, that "The verdict of the jury in favor of the defendant is against the weight of the evidence, and as a matter of law and logic is not supportable, * * *" since no motion to direct a verdict was made and the question therefore whether the verdict is supported by evidence is not before us for review, *Whiteman* v. *Pitrie*, 220 F. (2) 914, except upon a showing of manifest injustice which is not here made.

As to the claim that there was error in refusing the lengthy and detailed requested general charge set out on pages 148-158 of the record and the eight requested charges

set out at page 169-173 thereof, the record shows the complete failure of appellants to comply with the provisions of Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C.:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."[1]

and that they are therefore not in a position to assign error in respect to these charges. This is particularly true since the district court could not be required to consider and determine the correctness of the lengthy charges submitted to it without any grounds being put forward to show why they should be given and wherein the failure to give them was error.

As to the claims of specifications one, two, and three, that the court erred in limiting plaintiffs' recovery to a sixty day period, we agree with appellee that the judgment in plaintiffs' favor was not appealed from and is not before us, and we agree with it, too, that if this view is incorrect, appellants would stand no better. For in respect to this matter the district court in his charge, by mention at least four times of the sixty day limitation, specifically and definitely limited plaintiffs' recovery on it to this period, the plaintiffs made no objection to the charge, and a litigant cannot, by remaining silent when he

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[1] Curd v. Todd-Johnson, 213 F. (2) 864; Palmer v. Hoffman, 318 U. S. 109; Standard Oil Co. v. Burelson, 117 F. (2) 412; N. Y. Life Ins. Co. v. Slatter, 203 F. (2) 184.

should speak, put the judge in error by afterwards complaining of his action.[2]

In saying what we have said above, we do so with the full recognition that, notwithstanding appellants' failure to properly make and preserve grounds of error, this court can and will notice plain error either called to its attention by counsel or appearing to our own observation, *Ft. Worth & Denver* v. *Harris*, note 2, *supra*. Though, therefore, appellants in their brief do not point to a single instance in which the court, either without objection on their part or over their objections, has committed plain error, prejudicial in its nature and therefore reversible, because of the fact that appellants have briefed the case as though in this voluminous record there plainly appeared prejudicial errors of great magnitude, we have examined the record in the light of these complaints of the trial without discovering plain error of any kind.

All that the record shows is that both parties, exercising a self-imposed restraint as remarkable as it is unusual in making objections and exceptions, each no doubt speculating on a jury verdict, have committed the trial of the case to the district judge without substantial objection or other form of interposition. Having thus chosen their

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[2] Ft. Worth & Denver RR Co. v. Harris, 230 F. (2) 680; Bish v. Employers Liability Ins. Corp., 236 F. (2) 62; Bruce Construction Co. v. United States, 237 Fed. (2) 600; Sinclair Refining Co. v. Howell, 222 F. (2) 637; Ft. Worth & Denver R. Co. v. Janski, 223 F. (2) 704; Maryland Cas. Co. v. Reid, 76 F. (2) 30; Am. Fid. & Cas. Co. v. Drexler, 220 F. (2) 930; Mills v. Tex. Compensation Ins. Co., 220 F. (2) 942; Capella v. Zurich Gen. Acc. Liability Ins. Co., 194 F. (2) 558; Western Fire Ins. Company v. Ward, 131 F. (2) 541.

course, it is too late for the losing parties, after the speculation has turned out badly for them, to depart from it by seeking for the first time here to put the court in error and invalidate the results of this long trial by making large and unsupported claims of injury sustained by them, claims which were not made and preserved below.

In these circumstances, claims of the kind made here against the charge of the court and other matters, to which no objection was made or exception taken, are considered to be and are treated as afterthoughts.

Without, therefore, undertaking to discuss the voluminous evidence or trace the course of the trial, it is sufficient for us to say that neither assigned in the briefs nor plainly appearing on the face of the record has any reversible error been made to appear, and that the judgment appealed from must be affirmed.

APPENDIX B

SYDNEY GINSBERG, Appellant,

v.

U. S., Appellee.

Arthur B. Cunningham, Philip T. Weinstein, Daniel L. Ginsberg, Miami, Fla., for Appellant.

O. B. Cline, Jr., Asst. U. S. Atty., James L. Guilmartin, U. S. Atty., Miami, Fla. Charles K. Rice, Asst. Atty. Gen., Joseph M. Howard, Atty., Dept. of Justice, Wash., D. C. for Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before CAMERON, JONES and BROWN, Circuit Judges.

CAMERON, Circuit Judge:

[1] The appellant, Sydney Ginsberg, was convicted and sentenced on two indictments, consolidated for trial by the court, charging income tax evasions under § 145(b) of the Internal Revenue Code of 1939, for the years 1946, 1947 and 1948. The tax evasions charged and established by the Government's evidence were based upon specific omissions of income received.

The appellant was engaged in the wholesale purchase and sale of used automobiles in Miami, Florida, conduct-

ing some operations individually, others in partnership with his brother and others as an official of Nash Miami Motors, Inc. The proof of the Government, as presented by its attorney's final argument, showed that appellant had participated in the sale of 392 used cars during the years involved, and that he caused the books of the businesses in which he was engaged to reveal that a total of $224,958.56 had been received therefor, whereas the books of the purchasers of the cars showed that the amount received was $331,915.06, resulting in a tax evasion aggregating $106,976.50.

The Government placed upon the stand several witnesses who testified that their concerns had paid appellant the amount shown on his books as having been received, but had made additional payments "under the table" to appellant which did not appear on the books.

Appellant took the stand and denied categorically each and all of the statements of these witnesses, but the jury resolved these issues against him, convicting him on both counts of one indictment and one count of the other. He appeals from the judgments based thereon and raises, upon this appeal, six questions which are properly covered by specifications of error.[1] We find no merit in the issues

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(1) His brief thus states these questions:

1. "Did not the trial court err in refusing to grant a new trial (1) where the trial court on different occasions made conflicting statements as to whether or not two of the jurors, during the jury's deliberations had come to his chambers to consult about the case, and (2) subsequent evidence showed, on at least two occasions during deliberations, certain of the jurors separated from the others, one separation of which was unexplained, and the presumption of prejudice arising therefrom was unrebutted by the government?"

[*Footnote continued on next page*]

discussed under questions 1, 4 and 6 as set forth in Footnote 1. Appellant's argument in his answers to questions numbered 2, 3 and 5, however, convinces us that the convictions should be reversed and the cases tried again.

Under his question No. 2, appellant presents the issue whether the admission of evidence concerning deposits made in a joint bank account of the appellant and his deceased brother, was prejudicial error. Appellant and his brother had been engaged in other businesses besides the used car business, including dealing in real estate in various cities. While appellant was on the witness stand, the

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[*Footnote continued from previous page*]

2. "Where in a tax evasion case the government relied upon the theory of specific omissions of income from sales of automobiles, was it not plain and prejudicial error for the trial court to permit the United States Attorney, over objections, to question the appellant concerning a deposit of cash, made in a joint bank account of the appellant and his deceased brother, and to make an inflammatory and prejudicial argument to the jury on such inadmissible evidence?"

3. "Did the trial court commit prejudicial and reversible error by (1) denying appellant's motions for discovery and inspection, and quashing a subpoena duces tecum, and (2) denying a motion for new trial on newly-discovered evidence which evidence would have been available to appellant at the time of trial had the trial court granted appellant's motions for discovery and inspection?"

4. "Did the trial court err by refusing specifically to instruct the jury on appellant's principal defense?"

5. "Did the trial court commit plain error by permitting the United States attorney apparently to argue as if he were testifying as to facts within his special knowledge as such United States attorney:

(a) That he could have had 'fifty' people to show that the appellant is not of good character, and

(b) As to why the government sought to prosecute Nash rather than R.S. Evans?"

6. "Did the trial court commit plain and prejudicial error in that one portion of his charge had the effect of directing a verdict against the appellant?"

attorney for the Government questioned him at length concerning a number of individual deposits appearing in the joint bank account, some of them of large amounts of money. The Government had made a detailed examination of appellant's books and apparently had full information concerning those items. But appellant was clearly taken by surprise and was wholly unable to explain the source of some of the amounts shown on the account after the lapse of some eight years between the deposits and the time of trial. One item covered a deposit of $40,000.00 in the year 1947, and the Government's attorney asked if the deposit was not made in currency and the form of his questions assumed that such was the case. But appellant was never able to answer the questions concerning the source of this money.[2]

Another item was a deposit of $10,000.00, which the Government attorney also indicated had been made in currency. Appellant was later able to trace this $10,000.00 to his brother. After utilizing a recess of several days in the trial for investigation, appellant testified to the probability that the $40,000.00 had been deposited by the brother based upon his discovery that a short time thereafter, the brother withdrew from the account $52,000.00 for the purchase of a home.

The Government attorney made full use of appellant's inability to explain adequately these large deposits, as is illustrated by the excerpt from his argument copied in the

(2) Appellant objected to one question along this line in these words: "If the Court please, I think that is entirely immaterial. There is nothing in the evidence that it was made in cash, only the statement of the District Attorney." The objection was overruled by the trial court, and the attorney kept pressing the appellant as to where such an amount of currency came from.

margin.[3] Appellant sought to soften the impact of this testimony by requesting an instruction,[4] which the trial judge marked "Refused" over his signature.

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(3) "One of my last questions to Mr. Ginsberg was with respect to the $40,000 cash deposit in the bank account known as C & S bank account, here in the First National Bank. A $40,000 cash deposit. Now, that was Friday at 1 o'clock. Have you ever seen a ship flounder at sea? Have you ever seen somebody immediately taken by surprise? I am sure you noticed his demeanor on the stand and how hopelessly he looked. He answered that it was for a piece of property that he had sold. I said, 'All right, show us on your income tax return for 1947 where you sold a piece of property.' He looked, and he did not find it. And he stated that he remembered that in 1948 he filed an amended return for that piece of property, that piece of property up in Detroit and a number of lots, amounting to $46,000. I think that is in substance what he answered. He showed no piece of property sold in 1947 on his income tax return, he couldn't find it. . . .

". . . But I asked him where the $40,000 came from and he said he didn't know. I submit to you that there is a circumstance which would indicate to you that money can be traced. $40,000 in cash is a considerable amount of money. I have never seen that kind of money. I don't know if I ever expect to. At least, if I do, it will never be in cash. That is quite a bundle—$40,000. . . ."

(4) "Now in reference to the second or individual indictment, the defendant is there charged with wilfully and knowingly attempting to defeat and evade income taxes due and owing by himself to the United States of America by filing a false and fraudulent income tax return. There are three counts in this individual indictment.

"The first count of the individual indictment alleges that the defendant failed to report his share of all of the income received from the sale of used cars by a partnership in which he was a partner. You cannot convict the accused on this count unless the government establishes beyond a reasonable doubt that the partnership had income from the sale of used cars during the taxable period from November 1, 1945, to May 31, 1946, and that the defendant knowingly, willfully and fraudulently failed to report his share of all such partnership income in his income tax return for 1946. In order for the government to establish that the partnership had income the government must establish beyond a reasonable doubt, not only that one of the partners received certain money, but also that the money was received for the benefit of the partnership and not for the sole benefit of the individual partner."

We think that the admission of this evidence, compounded by the prominence given it in the argument, and the refusal of the requested instruction constituted prejudicial error under our recent decision in Blumberg v. United States, 1955, 222 F. 2d 496 [47 AFTR 879]. That was a case involving also specifically accounted for income which had not been reported, and we held that it was improper to admit proof that Blumberg's wife had spent money lavishly on a wedding of a member of the family in New York and that she had taken $30,000.00 in cash in a hand satchel and deposited part of it in a bank in New York and made a large loan to a named person. Here is a part of the language of that decision (P. 500):

> "Under the theory upon which the case was tried, that specifically accounted for income had not been reported, . . . no legitimate purpose could have been served by the proof that the defendant's wife took to New York in a hand satchel $30,000 in cash . . . . and that they had a tremendous wedding in one of the big hotels in the town at the cost of many thousand dollars. With that evidence before the jury, and no corrective charge given in respect of it, there was no possibility of defendant's securing an unprejudiced consideration by the jury of his claim that the omissions were due to oversight rather than intention. In addition, with no instruction given them in the matter, the jury is bound to have thought that this money was additional income which had been concealed and not reported."

We think what was there said is quite persuasive here.[5] And cf. Spies v. United States, 317 U. S. 492 [30 AFTR 378], 1943; Ford v. United States, 5 Cir., 1954, 210 F. 2d 313 [45 AFTR 319]; Jones v. United States, 5 Cir., 1947, 164 F. 2d 398 [36 AFTR 392]; and Hartman v. United States, 8 Cir., 1954, 215 F. 2d 386 [45 AFTR 1994].

We skip, for the time being, appellant's argument under his question 3, and take up that presented under question No. 5 dealing with the alleged improper argument of Government counsel. The appellant had taken the witness stand in his own behalf and had introduced four witnesses who had testified to his good character, and the Government had offered non contra. Near the end of his closing argument, the Government's attorney made this statement:

> "Now, with respect to the character witnesses. Mr. Fowler has stated that Mr. Worton [who was making the argument] didn't produce anybody who would say that he is a bad man. Now, I don't go for that. I could probably have fifty people in here who would show that he isn't a good character. I am not trying Mr. Ginsberg's character. I am not trying his character or his reputation. I am trying him for income tax evasion. . . ."

(5) The Government contends in the case before us that this case is differentiated from the Blumberg case in that the evidence was there offered as a part of the Government's cases, whereas here the questions were asked only on cross-examination of the appellant and with the view of showing his intent. The argument is not without some convincing force. But, in Blumberg, it was specifically stated in the record that the evidence was not offered to prove that the money possessed and spent by the wife represented the concealment or evasion of income tax, but that the evidence was admissible on the issue of willful intent. That is the same argument made here. We rejected it categorically in Blumberg, and we do not think it is sufficient to demonstrate that what happened here did not constitute harmful error.

Appendix B

In condemning this argument, we could not do better than to quote what was said by this Court in the recent case of Handford v. United States, 1957, 249 F. 2d 295:

> "A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States attorney in the district court was improper, prejudicial, and constituted reversible error."[6]

We recently reversed the conviction of a defendant upon a narcotics charge for a much less offensive statement than

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(6) To that text was cited the case of Berger v. United States, 1935, 295 U. S. 78, 88, and this language was quoted from it:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or the innocent suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

the one involved here, Joye Stanford Nalls v. United States, 1957, 240 F. 2d 707, and authority is not wanting for enforcement of the fundamental rules of fairness even where no exception is taken to the argument.[7]

We hold that this statement of the prosecuting attorney constituted "plain error[s] . . . affecting substantial rights" under Rule 52(b) governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the appellant could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error. This makes it unnecessary to decide whether the other errors discussed would, standing alone, justify a reversal of the case.

Under his third question appellant argues that the court below committed error which, he showed on his motion for new trial, resulted in manifest prejudice, in failing to require full responses to his two motions for bills of particulars, his motions for discovery under Rule 16, and in quashing his motion for subpoena duces tecum. The indictments against appellant were in general terms charging that his reported net income was a certain amount when in fact it was a larger specified amount. Without the aid of bills of particulars appellant was completely in the dark as to the details of the charges against him. The court ordered a bill of particulars in each case and one was filed, and appellant sought, by a second motion, additional information, which

(7) See, e.g., the criminal case of Read v. United States, 8 Cir., 1930, 42 F. 2d 630, 645, and the civil case from the Supreme Court of the United States, New York Central Railroad Co. v. Johnson, 279 U. S. 310, 1929.

was denied. He thereupon sought to obtain the desired information by the other means mentioned.

The Government knew all the time that it was going to prosecute appellant for understating his income from the sale of a certain number of used cars to certain purchasers for certain amounts. The information chiefly sought by appellant's efforts at discovery was the names of these purchasers, the number of cars involved, and the tax deficiency claimed on each transaction. To have furnished this information to appellant would not have weakened the Government's case to any extent.

The testimony introduced by the Government related to nine purchasers and three hundred ninety-two cars. In some instances, the books of the purchasers were introduced in evidence, but, by and large, the Government relied upon the testimony of its agents as to what these books showed as to these transactions in relationship to what appellant's books disclosed.

Appellant took the books which were introduced in evidence, after such introduction, and placed them in the hands of accountants for analysis. But this was not completed before the jury had returned its verdicts. Thereupon appellant filed motions and amended motions for new trial, attaching the reports of the auditors containing information calculated to discount considerably the evidence which had been given by the employees of these purchasing concerns.

As heretofore stated, the case turned into a swearing match between these employees of the purchasers on one side—bolstered by the testimony of the Government agents—and appellant on the other. The testimony of the appel-

lant's auditors, set out in the motions for new trial, would have been of great benefit to appellant if it had been available for introduction in evidence or for purposes of cross-examination during the trial.

Matters relating to discovery, to the details of proof and to rulings on motions for new trial are essentially committed to the sound discretion of the trial court, and its rulings ought to be disturbed only in rare cases. We would not predicate a reversal upon these rulings of the trial court here under discussion, if they stood alone.

As matters turned out, however, appellant was subjected to the series of procedures here discussed which were, without question, highly prejudicial. The weight of his testimony was greatly discounted, if not destroyed, by the effective use made by the prosecution of his inability to explain the source of the several large deposits in the joint bank account he had with his deceased brother. His legitimate effort to bolster his standing before the jury by character witnesses was largely nullified by the bald and completely unjustifiable statement of the prosecuting attorney that fifty witnesses were available to contradict the four who had testified for appellant. And, finally, appellant was cramped in defending against the large number of automobile sales disclosed by the Government's proof and in cross-examining the witnesses against him, by being denied some sort of advance showing on the part of the Government of the items which were to be used in the prosecution against him.

It is doubtful if exceptions to some of the rulings were properly taken, but a careful reading of this whole record leaves us in doubt whether the jurors were not so preju-

diced by the unwarranted assault upon appellant by the Government and the rulings of the court which we have discussed, that they were not able to reach their verdicts based alone on the evidence properly before them.

We are constrained to hold, therefore that under the circumstances herein discussed, the judgment should not be permitted to stand; cf. Tomley v. United States, 5 Cir., 1957, 250 F. 2d 549, 551; Dillingham v. United States, 5 Cir., 1935, Boyett v. United States, 5 Cir., 1931, 48 F. 2d 482. They are therefore reversed and the cases are remanded for a new trial.

Reversed and Remanded.

CAMERON, Circuit Judge, Dissenting:

I agree with my brethren upon the factual premises upon which the majority decision rests, but not with the conclusions. The most damaging error upon which the reversal is predicated is that relating to the breadth of cross-examination to which the Government attorney was permitted to go in exploring appellant's knowledge of deposits in the joint bank account he had with his brother. I think the unexplained receipt of large sums of money, under the facts of this case, was probably a proper matter for cross-examination if held within reasonable bounds. Doubtless the judge below would have narrowed the scope of this examination if he had been given a chance. But the only objection made during the extended cross-examination is that set forth in Footnote 2 supra. That objection was addressed solely to the contention that it was immaterial whether or not the $40,000.00 deposit was made in cash. The argument of the Government's attorney set forth in Footnote 3 was not objected to at all, and the instruction

copied in Footnote 4, even if it was calculated to benefit appellant in the manner claimed, was not covered by a sufficient objection under Rule 30[8] of the Rules of Criminal Procedure.

The very reprehensible argument made by the attorney for the Government concerning his ability to produce fifty character witnesses was not objected to at all.

The matter of discovery, of bills of particulars and the like must be left to the discretion of the trial court. United States v. Socony Vacuum Oil Co., 1940, 310 U. S. 150; Goldman v. United States, 1942, 316 U. S. 129; Indiviglio v. United States, 5 Cir., 1957, 249 F. 2d 549, 554 et seq. Aside from this, the stenographic report of the pretrial conferences shows that the parties discussed the Evans books, which constituted the largest proportion of the items relied upon by the Government.

In my opinion, by far the most serious deviation from accepted procedure, committed by the Government in the trial of the case, had to do with the use made of the dozen or more charts introduced in connection with the testimony of the revenue agents. The "take-offs" made by these agents from the books of the nine concerns which had purchased cars from appellant constituted the only actual evidence of these transactions placed before the jury, although the books of four of the nine were offered in evidence *en masse*. Agent Weir, who had done the greater part of the work on the Evans books, died before the trial, and his work sheets and the summaries made therefrom

(8) "No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." [Emphasis added.]

were received in evidence as if the dead-man had been there to prove their correctness.

More important, the agents were permitted to use these take-off sheets and the work papers of the agents—secondary evidence at best—to construct charts made up of a composite of these work sheets covering the various purchases and contrasted with figures taken by the agents from the books of appellant, his partnership and the corporation of which he was an officer.

One or more agents, authors of the foregoing charts, were permitted to remain in the courtroom and, listening to the testimony of witnesses, to place upon those charts their concepts of what the witnesses had testified, and to add to the whole assembly their own opinions as to what conclusions ought to be reached from the various processes of comparison, addition, subtraction, and deduction.[9]

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(9) Some of the answers of the agents would run into several pages. The following excerpt from one of them will show the method of proof resorted to by the Government:

"This is during the taxable year . . . during which there was in existence the partnership and the corporation, and that is why we have three separate net worths. [As if net worth had any place in a prosecution based upon specific omissions.] You will see that there are two corporation figures which will be united into one, later. However, the total is all we are concerned with now. During the period . . . R. S. Evans, by the testimony, in the Nash records it shows that they sold Evans $64,765; that was testified to in Exhibit 43. The Evans records show that they paid $115,310.50, and the mathematical difference between the two is $40,545.50 in this particular instance, as testified to in Exhibit 8, by Mr. Zuckerman. Julius Stern, ten cars, for $4,890, was testified to in Exhibit 43 by Mr. Zuckerman, and the cost by Mr. Stern, as testified to in Exhibit 19 that he paid, is $7,465. He also testified that he paid in cash $2,575. Gem Motors, fourteen cars for $5,765, as testified to by Mr. Zuckerman in Exhibit No. 43, as appears in the testimony in Exhibit 21, Gem Motors paid $11,196 for these cars. And also in

[*Footnote continued on next page*]

Appendix B

In my opinion, this damaging discussion, based essentially upon analysis and opinion, was not testimony at all, but summation, argument, pure and simple. It is doubtful if the agents testified to any fact which could be called testimony—if so, it was an infinitesimal part of the whole. If the Government is to be permitted to resort to such methods in developing its cases, the court should, in my opinion, tell the jury that the witness is not essaying to give any facts, testimony in its only true sense, but is summing up the case, is making an argument as essentially partisan as the closing argument of the United States at-

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[*Footnote continued from previous page*]

Exhibit 21 they paid in cash $5,431. There again, is a mathematical difference between the two (indicating). Regil Motors, the Nash records show; by the testimony of Mr. Zuckerman in Exhibit 43, as per the Nash records as testified to by Mr. Zuckerman on Exhibit 43, shows $875, and as per the Regil Motors records on Exhibit 15, it shows $1,475. And in the category, 'others,' according to the Nash records, Nash received $6,097.62, and there is no testimony on that, and inasmuch as there is no difference there, there is no result in the difference here. There is a total of $82,392.62, as the total of the five above, indicating sales by Nash during this period. A total of $141,544.12 representing the total paid for these cars, as testified in four instances, and there is no change relating to the 'others.' That is during the time of the partnership. It was incorporated on February 1947, and so during that time the testimony is that Nash sold to R. S. Evans 120 cars, as testified to by Mr. Zuckerman in Exhibit No. 42, for $66,030. And the testimony in Exhibit 9, of the Evans records, shows that Evans paid $95,525 for these cars, against the testimony in Exhibit 9. And it also shows that $29,495 was paid in cash. However, that again also is a mathematical difference. Regil Motors, the Nash records testified to by Mr. Zuckerman, Exhibit No. 42, 27 cars for $10,272. Exhibit No. 15 shows that they paid $17,870 for these cars, and there is a $7,145 mathematical difference. The A. A. Auto Sales for the same period, according to the Nash records, as testified to by Mr. Zuckerman in Exhibit No. 42, was for 20 cars at $16,900; and as testified to in Exhibit 29, the cost to A. A. Motor Sales, according to Muir's testimony, was $22,275, and also as testified, $5,375 in cash. This again is the mathematical difference (indicating)."

torney—with a corresponding reduction in the latter's time for argument.

The point is that the appellant did not object to this method of proof. Various objections were interposed as to the minutiae of the statements the agents were making, but appellant did not ask the court to take any action which would protect him from such prejudicial methods,[10] and no error is argued based upon them.

Every trial lawyer is faced, at every stage of a case, with the problem whether he should risk the ill will of the jurors by interposing frequent objections, or should cultivate their good will by seeming to cooperate in the fullest development of the truth. But this is an election which must be made. Appellant was represented by eminent and astute counsel and throughout the trial he elected to withhold the making of objections and take his chances with the jury. Concerning a situation resembling this one, we said recently, in De Fonce Construction Co., Inc. et al v. The City of Miami etc., June 18, 1958, — F. 2d —:

> "All that the record shows is that both parties, exercising a self-imposed restrain as remarkable as

(10) The court finally intervened with this statement relating to one small segment of the case: "I do not think that there ought to be any charts exhibited to the jury, in view of the feeling that I have about the case, which purports to split fifty-fifty the diverted income. You can argue it to the jury, but they have got to make a finding on that themselves. They have got to infer that from the evidence of the case, and I do not think any expert can infer it for them."

This, in my opinion, was a correct and clear statement of the law, but it came after many charts had been presented before the jury in bold letters and after the damage to the appellant had been done. Doubtless the court would have ruled earlier on the question if it had been called upon to do so.

> it is unusual in making objections and exceptions, each no doubt speculating on a jury verdict, have committed the trial of the case to the district judge without substantial objection or other form of interposition. Having thus chosen their course, it is too late for the losing parties, after the speculation has turned out badly for them, to depart from it by seeking for the first time here to put the court in error and invalidate the results of this long trial by making large and unsupported claims of injury sustained by them, claims which were not made and preserved below."

In my opinion, "Sitting as we do as an appellate court, we are justified in finding error in the actions of the trial court only with respect to matters presented to that court, and limited to the contentions made to it as the basis for the requested action."[11]

Where, as here,—and it must be recalled that appellant does not contend that the evidence was insufficient to convict him—"the record fairly shrieks the guilt of the" appellant, Lutvak v. United States, 344 U. S. 604, 619-620, I do not think we should apply Rule 52(b) and notice the errors mentioned.[12] Therefore, I respectfully dissent.

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(11) Indiviglio v. United States, *supra*, at p. 553. In that case, we discussed the whole question fully and cited and considered the authorities at pages 560-563.

(12) Cf. the cases listed in Footnote 2 of De Fonce v. Miami, supra.

APPENDIX C

JUDGMENT.

Extract from the Minutes of June 18, 1958.

DE FONCE CONSTRUCTION COMPANY, INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

No. 16706. versus

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Defonce Construction Company, Inc., J. B. Cooper and Manufacturers Casualty Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.